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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 208

THE UNITED STATES OF AMERICA

v.

JOSE CANDELARIA ET AL.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

JURISDICTION

This case comes to this Court upon a certificate of the Circuit Court of Appeals for the Eighth Circuit filed November 19, 1924, submitting two questions upon which that court desires instruction. The jurisdiction of this Court in such cases arises under Section 239 of the Judicial Code.

STATEMENT OF THE CASE

The United States brought suit August 28, 1922, in the United States District Court for the District of New Mexico to quiet title in the Pueblo of Laguna to certain lands against the claims of

Candelaria and others, and to enjoin them from interfering with the use or possession of such lands.

The lands involved are known as the "Paguate Purchase," acquired by the Pueblo of Laguna, prior to 1769, by deed from the heirs and assigns of certain grantees of the Government of Spain. This conveyance was recognized and confirmed as a conveyance of the tract to the Pueblo by deed of June 1, 1820, executed by a Spanish official known as the "protector general of the Indians," and on August 26, 1826, this last deed was approved by the governor of the Province of New Mexico. The lands were thus held, claimed, and occupied by the Pueblo of Laguna at the time of the acquisition of this territory by the United States in 1848, and were confirmed to this Pueblo by Act of Congress of June 21, 1860, c. 167, 12 Stat. 71, § 3,[1] and patented pursuant to said confirmation by the United States on September 22, 1884.

Some of the defendants were permitted by the Pueblo to cultivate certain areas of the lands involved, but beginning in 1906 the defendants commenced fencing other tracts in this area belonging to the Pueblo, the result of which was the exclusion of the Indians of the Pueblo "from lands which they had cultivated and irrigated for many years." (R. 1–2.)

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[1] The bill of complaint and certificate erroneously state the confirmation to have been by Act of Congress of March 3, 1869, c. 152, 15 Stat. 342.

To its bill containing allegations in substance as above set forth, the defendants answered admitting the Pueblo's ownership of the "Paguate Purchase," but asserting that the patent issued to the Pueblo by the United States described land to the north of the *true* northern boundary of the grant as it had existed. It was further alleged that the claim of the Pueblo to these lands lying north of the so-called true boundary had been adjudicated adversely to it in a suit instituted by it in February, 1910, in the territorial court of New Mexico against many of the defendants in the case at bar, for the purpose of quieting title in the Pueblo to this same land; that in said suit the territorial court had found and determined that the defendants had possession under a grant called the "Cebolleta Grant" of portions of the lands lying within the lands patented to the Pueblo as the "Paguate Purchase" but that the *true* southern boundary of the Cebolleta grant embraced these lands and that the surveyed northern boundary of the "Paguate Purchase" was too far to the north of the true boundary, and conflicted with the Cebolleta grant. It was therefore adjudged by the territorial court that the Pueblo of Laguna "was not entitled to any relief against the defendants claiming under the Cebolleta grant" (R. 3), and a decree was entered dismissing the cause.

The defendants further set up an adjudication of the United States District Court for the Dis-

trict of New Mexico in a subsequent suit instituted March 17, 1916, by the Pueblo of Laguna for the purpose of quieting its title to the same lands, wherein the bill of complaint was dismissed upon motion of defendants for the reason, among others, that the matter presented thereby was *res judicata*. (R. 4.)

In neither of these suits was the United States a party, nor had it authorized said suits or participated therein. (R. 4.)

The District Court dismissed the Government's bill, finding (R. 4, 5):

> * * * as matter of law that the pueblo of Laguna was a corporation by virtue of a statute of the Territory of New Mexico and capable of suing in respect of its lands, and that this territorial statute was not inconsistent with the guardianship of the United States over the Indians of the pueblo of Laguna, and that the District Court of Valencia County, New Mexico, was a court of general, unlimited jurisdiction, with jurisdiction of the subject matter and of the parties in the suit instituted in that court by the pueblo in 1910, and that its decree therein was a final adjudication of the matters presented in that suit and binding upon the parties thereto and, furthermore, was a complete adjudication of the matters presented by the bill of complaint in the present suit and operating as a bar to the prosecution thereof, and that the dismissal of the suit instituted by the pueblo on the 17th of March, 1916, in the

United States District Court for the District of New Mexico, was a further adjudication of the matters presented by the bill of complaint and was also a bar to the prosecution of the present case.

An appeal was taken by the United States to the Circuit Court of Appeals for the Eighth Circuit, which has certified to this Court these two questions (R. 5):

> Question I. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States?
>
> Question II. Did the State court of New Mexico have jurisdiction to enter a judgment which would be res judicata as to the United States in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an act of Congress confirming such grant to said Pueblo Indians?

On the questions raised by the certificate, we submit the following

PROPOSITIONS

1. The United States possesses the power and authority to control the Pueblo Indians of New Mexico with respect to their lands.

2. In the instant case the United States is suing to vindicate its policy with respect to the Indians, and to discharge its obligations to them—a distinct governmental interest.

3. Since the United States was not a party to the previous suits brought by the Pueblo of Laguna, it can not be bound thereby, especially since the right which it seeks to vindicate is entirely distinct from the property rights of the Pueblo, the subject matter of the previous suits.

4. The answer to Question I disposes of Question II, unless the latter be considered independently of the former. In that event, we concede that the State court did have *jurisdiction* to enter the judgment specified, but do not concede it to have a binding effect as to the United States.

ARGUMENT

I

The United States possesses the power and authority to control the Pueblo Indians of New Mexico with respect to their lands

The status of the Pueblo Indians in New Mexico was so thoroughly considered by this Court

in *United States* v. *Sandoval*, 231 U. S. 28, that we consider it unnecessary to do more than to summarize what was said in that case on that point, namely, that the Pueblo people have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities, and public moneys have been expended in their civilization and instruction; agents and superintendents have been provided to guard their interests; and their lands were exempted from taxation (pp. 39, 40).

The basis of the guardianship and protection by the United States over the Pueblo Indians was thus stated (pp. 45, 46):

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.

Of particular importance here is the holding of the court that the fact that the Pueblos have a fee simple title to their lands does not put them beyond the protection and fostering care of the

United States. On this point it was said in part (p. 48):

> It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs.

This holding was in entire harmony with a long line of decisions of this Court establishing and maintaining the proposition that with respect to their *tribal* lands and property the power of Congress over the Indians is plenary; the extent of its exercise is a political, not a judicial, question; citizenship of the Indians is not inconsistent with its exercise, and that it is for Congress and not the courts to determine when it shall cease. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 310, 311; *Williams* v. *Johnson,* 239 U. S. 414, 420; *Hallowell* v. *Commons,* 239 U. S. 506, 509; *Winton* v. *Amos,* 255 U. S. 373, 392.

Evidence of the congressional attitude respecting the Pueblo Indians and their lands is contained

in the New Mexico Enabling Act of June 20, 1910, c. 310, 36 Stat. 557, where one of the irrevocable conditions exacted was Sec. 2, par. 2, p. 558:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to * * * all lands * * * owned or held by any Indian or Indian tribes the right or *title* to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished *the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.* (Italics supplied.)

Following a provision that no State taxes should be imposed upon lands or property of the United States, there was this qualification:

> * * * but nothing herein, * * * shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

These provisions by their very terms include Pueblo lands, and that Congress had the Pueblo Indians in mind is shown by the first paragraph of this same Section 2, wherein there was a condition for the prohibition of the "introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico." This last-mentioned prohibition was particularly considered in the *Sandoval* case.

A very pertinent recent further evidence of the attitude of Congress is the Act of June 7, 1924, c. 331, 43 Stat. 636, entitled "An Act to quiet the title to lands within Pueblo Indian land grants, and for other purposes." (Appendix A.) That Act provides (Sec. 2) for a "Pueblo Lands Board" whose duty is to investigate, determine, and report the lands with the boundaries of the Pueblos, the title to which has not been extinguished as provided by the Act; that is, by adverse occupancy for specified periods (Sec. 3).

The purpose of the Act was to settle disputes between the Pueblos and white claimants. As to lands the title to which is found not extinguished, the Attorney General is to bring suit to quiet title (Sec. 1). Of especial significance is Section 17, which is:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall

> hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

The point we desire to make is that it shows that Congress considered the lands of the Pueblo Indians subject to legislative control as are lands of the Indians which are held in *tribal* ownership.

Because Section 17 is prospective by its terms, it can not properly be said that it shows that theretofore the government had not exercised control or supervision over the Pueblos with respect to their lands, or had not stood as guardian or been under the duty of protecting the Pueblos. It was merely an evidence of the power of Congress to exercise control and of the relation which the Government had to the Pueblos. Construed in the light of the provisions of the Enabling Act, it makes clear the intent of Congress regarding the Pueblos. The intent of Congress in regard to its enactments may be indicated by subsequent enactments relating to the same subject matter. *Bowling* v. *United States,* 233 U. S. 528, at pp. 535, 536.

There is nothing in *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, which can properly be opposed to the assertion that the United States does have authority over the Pueblo lands such as to warrant its intervention to protect the Indians' rights. What was decided in the *Santa Rosa case* was that that Pueblo had capacity to institute and maintain an action to protect its lands from unauthorized encroachments of executive officers. The action which the bill in that case asserted was threatened, was not an exercise of guardianship, but of confiscation (p. 113). Compare *United States* v. *Mille Lac Chippewas,* 229 U. S. 498.

There is no contention in the instant case that what the United States seeks to accomplish is confiscation of the Pueblo's lands; on the contrary, it is clear that what is sought is *protection* of the lands; thus the Government is discharging a duty which it owes to the Pueblo Indians.

Nor is there any significance in the provision in Section 6 of the "Pueblo Lands Board Act," *supra,* giving the right to any Pueblo to seek a review in the Federal court of any finding of the Board affecting it. This is not a relinquishment of guardianship by the United States; it merely gives the Pueblo a status to maintain the proceedings so that the Indians may protect themselves from confiscation of their property. Perhaps Congress had in mind the decision in the *Santa Rosa case.*

What has been said about the provision in Section 6 is also applicable to the fourth paragraph of Section 4, which preserves "any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, * * * in any court of competent jurisdiction" * * *. There is nothing in that provision inconsistent with the guardianship of the United States.

Nor is the fact that the Pueblo was under the territorial law granted a status to sue on its own behalf and name of any weight. Broadly speaking, individual Indians may maintain actions in State courts to protect their property rights, but that does not affect the right of the Government to sue respecting the Indians' property.

II

In the instant case the United States is suing to vindicate its policy with respect to the Indians and to discharge its obligations to them—a distinct governmental interest

As Congress owes the Pueblo Indians the duty of protection, and of safeguarding their rights, when it acts to discharge those obligations it proceeds in its own right and to vindicate its own policy. This interest is entirely distinct from any property interest of the Indians for whom it acts, and indeed a property or pecuniary interest in the United States is not a prerequisite to give it capacity to sue.

In *Heckman* v. *United States,* 224 U. S. 413, this Court considered a challenge of the right of the United States to maintain a suit to set aside conveyances of lands made by Cherokee allottees in violation of restrictions on alienation imposed by Congress and said (p. 437):

> During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians can not be gainsaid. * * * The maintenance of the limitations * * * is distinctly an interest of the United States. * * *
>
> This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, in 1838, patent was issued to the Cherokees providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves, * * *. It was the intent of Congress that, for their sustenance and as a fitting aid to their

> progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands.

We submit that there was no greater need for protection of the Cherokees than there is for the Pueblo Indians of New Mexico, and that what was said in the *Heckman case* is equally applicable to their situation. And the power of the Government to protect does not fall short of the need. *Sunderland* v. *United States,* 266 U. S. 226, 234.

Now the fact that the Pueblo of Laguna has fee simple title does not remove it from governmental supervision. *Brader* v. *James,* 246 U. S. 88, is very much in point on that proposition. There, a Choctaw full blood received a tract of land as heir of an allottee. As the law then stood she received the land free from restrictions on alienation. The power of Congress to reimpose restrictions was upheld, this Court saying that in view of its repeated decisions there was no doubt of the constitutionality of the legislation; that while the tribal relation existed the national guardianship continued, and (p. 96):

> This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued.

Another striking case on this point is *United States* v. *Osage County,* 251 U. S. 128, where this

Court upheld the authority of the United States to sue to protect Osage allottees from arbitrary, excessive, and discriminatory taxes imposed upon their lands by tax officials of the State. The point which we especially emphasize is that Congress had previously made the lands subject to taxation. It was contended that by the Act which made the lands subject to taxation the United States exhausted its power as protector and guardian of the Osage Indians, and as to them had no longer any mission or authority whatever. The Court said of that (p. 132):

> We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning.

And (p. 133):

> Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated.

A pecuniary interest in the relief sought is not essential; it is enough if there be an interest or concern arising out of an obligation to those for whose benefit the suits are brought. *United States* v. *New Orleans Pac. Ry. Co.*, 248 U. S. 507, 518.

This duty of safeguarding a dependent Indian people dwelling within the United States is a recognized public purpose. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 88.

If this duty and authority and capacity exist and are upheld when the interest of an individual Indian under guardianship is concerned, how much more reason there is for upholding them where property of tribal Indians is concerned, or, to fit it to the precise case here presented, where the property involved is held by Indians by communal title.

This power or duty is not confined to cases which arise from the disregard of definite statutory inhibitions. Witness, the *Osage County case, supra,* and *Cramer* v. *United States,* 261 U. S. 219, where the United States sued to protect the individual occupancy rights on public lands of three Indians.

III

Since the United States was not a party to the previous suits brought by the Pueblo of Laguna, it can not be bound thereby, especially since the right which it seeks to vindicate is entirely distinct from the property rights of the Pueblo, the subject matter of the previous suits

The United States was not a party to either of the two suits brought by the Pueblo of Laguna. This is a short answer to the question as to the

effect as against the United States in this suit of the judgments in those two previous suits.

But perhaps we should discuss somewhat the reason why we think this a sufficient answer.

The Pueblo of Laguna in instituting the two suits proceeded in its own right to protect itself against invasions of its property rights by the defendants. The United States, as we have seen, has a distinct and different status in its litigation, that of discharging a duty to its wards and enforcing and maintaining a public policy.

Now the Pueblo of Laguna had no standing to proceed in vindication of the rights of the Government; it could not maintain a suit upon that footing, and hence could not represent the United States. The interest which entitled it to maintain the two previous suits was its property interest derived from the title by patent from the United States.

Since the interests of the United States and the Pueblo are different and distinct, there can be no privity between them.

The rule as to estoppel by judgment or *res judicata* is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery can not be disputed in a subsequent suit between *the same parties or their privies. United States* v. *Moser,* 266 U. S. 236, 241.

All doubt that these two prior judgments can not be pleaded in bar of the present suit is, as we

think, foreclosed by previous decisions of this Court.

In *Bowling* v. *United States,* 233 U. S. 528, the Government sued to set aside a conveyance of land made by heirs of an allottee in violation of restrictions against alienation. It appeared that prior to the execution of the deed of conveyance a contract for the sale of the land had been entered into between the heirs and a predecessor in title of Bowling, and that a suit had been instituted by the heirs in the United States Court for the Northern District of the Indian Territory to enforce this contract by requiring a specific performance, which resulted in a decree sustaining the contract and requiring the acceptance of a deed to the land tendered by the heirs.

To the contention that this decree was *res judicata,* this Court said (pp. 534, 535):

> * * * as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created can not be impaired by any action without its consent. *Heckman* v. *United States, supra,* p. 445. If, therefore, the conveyance by the allottee's heirs, in the present case, would otherwise have been

> subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

Privett v. *United States,* 256 U. S. 201, was a suit to cancel conveyances of land made by heirs of a half-blood Creek Indian, to whom it had been allotted as a homestead. The theory of the Government's bill was that a minor child of the allottee was born after March 4, 1906, and therefore, under the terms of an Act of Congress, the homestead allotment was inalienable and must be held for the support and benefit of this minor for a specified period.

One of the defenses interposed was that *it was settled conclusively* in a prior suit *that the child was born February 23, 1906* (in which event the land was alienable). That suit was brought by the immediate grantee of the heirs to quiet title in him to the land after he had taken the deeds. This Court sustained the right of the United States to litigate that same question, and said (p. 203):

> The reliance on the decision in the prior suit is ill-founded. That suit was between the heirs and one who was claiming under these conveyances, the United States not being a party, and the decree therein pronounced the conveyances valid. This suit is brought by the United States in virtue of its interest in maintaining the restriction and safeguarding the Indians in the

> possession and enjoyment of the lands allotted out of the tribal domain. As yet the Indians have not been fully discharged from the guardianship of the United States.

Sunderland v. *United States,* 266 U. S. 226, was a suit by the United States to set aside a conveyance of land made by a half-blood Creek Indian and to annul a decree of a State court quieting title to the land in the Indian's grantee. In this Court the appellant did not seriously question the correctness of the decree below in so far as it had annulled the State court decree, and this Court merely referred to the *Bowling* and the *Privett cases* (p. 232).

In view of the foregoing, we believe it clear that the first question certified should be answered in the affirmative.

IV

The answer to Question I disposes of Question II, unless the latter be considered independently of the former. In that event, we concede that the State court did have jurisdiction to enter the judgment specified, but do not concede it to have a binding effect as to the United States

Question II, it seems to us, is disposed of by the answer to Question I. If, as we think, the judgments in the suits brought by the Pueblo of Laguna in its own name and right are not *res judicata* against the United States in the instant case, then it is wholly immaterial whether the State court in the first suit of the Pueblo had

jurisdiction to enter the kind of judgment which it did enter in that suit. Whatever the result of that judgment, the present suit of the United States is unaffected by it.

Likewise, if Question II is considered in connection with Question I, a negative answer to the latter will dispose of the former, because, if the United States is held to be barred by the former judgments that settles the matter.

Unless, therefore, Question II is considered independently of Question I, or it be determined that Question II must be answered first, it would seen unnecessary to discuss it.

In our judgment, the point which the Circuit Court of Appeals desired to present would have been made clearer if the reference to the United States had been omitted and the question framed thus:

> Did the State court of New Mexico have jurisdiction to enter a judgment in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an Act of Congress confirming such grant to said Pueblo Indians?

We believe this Question II to have been prompted by a contention made on behalf of the United States in the Circuit Court of Appeals that the territorial, later the State, court, judg-

ment was not binding either upon the United States or the Pueblo of Laguna, because the result of it was to alter and modify the northern boundary of the grant to the Pueblo as established by the survey made by the United States and upon which patent had issued to the Pueblo.

The theory upon which this contention was advanced was that the courts are without power to make or correct surveys of public lands; that such matters are the function of the political departments of the Government. *Knight* v. *Land Ass'n*, 142 U. S. 161; *Russell* v. *Maxwell Land Grant Co.*, 158 U. S. 253, and *Stoneroad* v. *Stoneroad*, 158 U. S. 240, were adduced to support that proposition.

Upon further consideration we are of opinion that this proposition can not be sustained.

There is no dispute that the territorial court had jurisdiction of the parties in the suit instituted in that court; the land involved was within its territorial jurisdiction; it had jurisdiction of suits to quiet title to lands so situated.

We do not construe the language used in the cases cited and others which are to the same effect that the courts have no power or jurisdiction to make or correct surveys to mean that the courts can not entertain actions to quiet title where the foundation of the action or the defense interposed to it is based upon an assertion of an error in the survey. We think that what is meant is that in such cases the court hearing the

cause is to be governed by this rule of law established by the adjudicated cases. But the ignoring of that rule does not make the judgment rendered a nullity. The judgment is erroneous, but the party prejudiced is not at liberty to ignore it; his remedy is by appeal.

The jurisdiction of a court does not depend upon the correctness of the judgment rendered; jurisdiction is the power to decide, not merely the power to decide correctly. *Fauntleroy* v. *Lum,* 210 U. S. 230, 235; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305–308.

It follows that Question II, in the form in which it is submitted, should be answered in the negative, for the court did not have "jurisdiction" of the United States, which was not a party to the suit, and for the further reasons hereinbefore stated.

Considering the question as presenting the point upon which we believe the court desired instruction, we think it should be answered in the affirmative.

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OCTOBER, 1925.